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# The Faster You Copy, the Less You Infringe: Beating Copyrights Without Fair Use

*David Overcash\**

## A. INTRODUCTION

It required a strange lawsuit involving three groups of litigants, including parties described as “defendants-counter-claim-plaintiffs-third party plaintiffs-appellants,” to resolve a copyright dispute over a TiVo-like service offered by a cable company.<sup>1</sup> The lawsuit boils down to this: a host of television content providers and copyright holders—including Cartoon Network, Universal Studios, Twentieth Century Fox, and Disney—brought suit alleging direct copyright infringement by CSC Holdings and Cablevision, Inc. (collectively “Cablevision”), who provide a “Remote Storage DVR System” (“RS-DVR”) for their customers’ use.<sup>2</sup> The RS-DVR allows users to select television programs to record on remote equipment that Cablevision owns and operates at a remote site, which are then available for later playback at the touch of a button.<sup>3</sup>

The case arrives before the Second Circuit on appeal of an award for summary judgment to the content-provider plaintiffs.<sup>4</sup> The United States District Court for the Southern District of New York granted injunctive relief, barring Cablevision from operating the RS-DVR system without first obtaining licenses from its content providers.<sup>5</sup> The Court of Appeals reversed, holding that: 1) the cable company’s copies were not “fixed” sufficiently to meet the Copyright Act’s (“the Act”) definition of “copy;” 2) the customers actually “made” the copies, therefore the cable company is not liable directly under the Act; and 3) the RS-DVR’s playback transmissions are not performances “to the public” and do not infringe any exclusive right under the Act.<sup>6</sup>

The Second Circuit’s second and third holdings are relatively simple to understand due to the RS-DVR’s similarity to a more primitive system em-

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1. See *Cartoon Network L.P. v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

2. *Id.* at 124-25.

3. *Id.*

4. *Id.* at 124.

5. *Id.*

6. See *id.* at 130-33 (first two holdings regarding creation of copies), 139 (third holding on public performance).

playing common videocassette recorders and telephones.<sup>7</sup> The RS-DVR does not create a “copy” until a customer makes an active request and that copy appears as a playback viewable only by that customer, which does not qualify as “a performance to the public” under the Act.<sup>8</sup> The court’s first holding is vulnerable to more criticism and likely invites abuse; it seems dependent both upon the specific characteristics of the RS-DVR technology itself, via an analogy to the random access memory (“RAM”) of computer systems, and the lifespan and utility of the copies stored on the system.<sup>9</sup>

## B. FACTUAL BACKGROUND

Cablevision’s business involves aggregating television programming from content providers and transmitting those programs to customers, via coaxial cable, in a single data stream.<sup>10</sup> Generally, this transmission occurs in real-time, and customers are only able to view programs when the content provider schedules its broadcast.<sup>11</sup>

The new RS-DVR system changes this limitation. The single data stream is split as half is immediately routed to customers and the other half enters a “Broadband Media Router” (“BMR”) that buffers the data, reformats it, and sends it to a server with many high-capacity hard disks.<sup>12</sup> The server then determines whether a customer requested that program, and if so, moves it through another buffer to a hard disk designated to the customer.<sup>13</sup> The first buffering process retains only one tenth of a second worth of programming from any given channel, after which different data erases and replaces it.<sup>14</sup> The BMR only contains 1.2 seconds worth of programming at any given time.<sup>15</sup>

The district court noted that “the RS-DVR is not a single piece of equipment” as it is a multi-part system, requiring dedicated computers and twenty-four hour maintenance staff.<sup>16</sup> This complexity is inconsequential to the service’s customers—they operate the system in the same fashion as a standard

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7. See generally *id.*; see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding manufacturer not liable for infringement as “time-shifting” function of Betamax VCR satisfies fair use requisites).

8. *Cartoon Network*, 536 F.3d at 139.

9. *Id.* at 129-30.

10. *Id.* at 124.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 124-25.

16. *Id.* at 125 (citing *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 612 (S.D.N.Y. 2007)).

set-top DVR with their remote control.<sup>17</sup> The RS-DVR's method of operation is nearly identical to a video-on-demand service ("VOD") where customers request the transmission of content stored at the cable company's remote facility.<sup>18</sup> The difference is that the user can only play back content they selected earlier for recording, which occurs according to the general broadcast transmission schedule.<sup>19</sup> Cablevision's RS-DVR service only records programs from channels offered by the company and subscribed to by the customer.<sup>20</sup> Cablevision considered further limiting the available channels. Although they had the capacity, they chose not to during development.<sup>21</sup> Cablevision offered this service without paying any additional license fees to the content providers.<sup>22</sup>

### C. PLAINTIFFS' CLAIM

A host of television content providers filed the case in the United States District Court for the Southern District of New York.<sup>23</sup> The tripartite claim was limited to only direct infringement claims against Cablevision, who waived any fair-use defense.<sup>24</sup>

The first claim alleged Cablevision's RS-DVR system directly infringed the exclusive right of reproduction for protected works under the Act through the creation of "copies" in the data buffering system.<sup>25</sup> Second, the process of writing the programs to the server hard disks ("playback copies") allegedly was a direct infringement of the exclusive reproduction right.<sup>26</sup> Finally, the plaintiffs argued that transmission of these recordings in response to a customer request was a direct infringement of the exclusive right of public performance.<sup>27</sup>

### D. PROCEDURAL HISTORY

The Southern District of New York awarded summary judgment for plaintiffs on all three infringement claims.<sup>28</sup> The court granted plaintiffs re-

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17. *See Cartoon Network*, 536 F.3d at 125.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *See generally id.* at 124.

23. *Id.*

24. *Id.*

25. *Id.* at 125.

26. *Id.*

27. *Id.*

28. *Id.*

lief by issuing an injunction that barred defendant from employing the RS-DVR system without first acquiring licenses from the content providers.<sup>29</sup> Cablevision appealed this judgment to the Second Circuit.<sup>30</sup>

### E. HOLDING OF THE SECOND CIRCUIT

The Second Circuit denied the plaintiffs' motion for summary judgment and granted summary judgment for the defendants—a complete reversal warranting a detailed examination of the district court's holdings.<sup>31</sup> The lower court's first holding relied on the evaluation of the RS-DVR process as a whole, noting the "aggregate effect of the buffering was to reproduce the entirety of Cablevision's programming."<sup>32</sup> The court rejected the defendant's argument that the data was not "fixed" and, therefore, the buffer data could not be "copies" under the Act.<sup>33</sup> The trial court reduced the second claim to a question of "who makes the copies?"<sup>34</sup> The district court analyzed different stages of the process and determined that Cablevision was the dominant actor since it had "unfettered discretion" over the available content, owned and maintained the physical components of the RS-DVR, and had a "continuing relationship" with the customers.<sup>35</sup> This analysis found infringement through copying, despite the mandatory participation of a customer in requesting the recording's making.<sup>36</sup> Finally, Cablevision's concession that the playback responding to the customer's request was a "performance" somewhat simplified the third infringement claim.<sup>37</sup> Despite this concession, the court below rejected Cablevision's two part argument that this performance was: 1) performed by the customer, not Cablevision; and 2) not performed "to the public" since only individual customers received it.<sup>38</sup> The district court dispensed with the former part of the defense's argument on the same basis as the second infringement claim.<sup>39</sup> By relying on a prior case from the Northern District of California—which held that if a commercial relationship between the transmitter of a performance and the audience exists, then such transmission is "to the public,"—the court rejected the latter part because the

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29. *Id.* at 126.

30. *Id.*

31. *Id.* at 140.

32. *Id.* at 125.

33. *Id.*

34. *Id.* at 126.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

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“same program” would transmit to the “members of the public, who may receive the performances at different times.”<sup>40</sup>

The Court of Appeals used a similar approach to organize the content providers’ infringement by discussing its holdings in terms of the plaintiffs’ allegedly infringed rights: reproduction and public performance.<sup>41</sup> The Second Circuit reversed the court below and granted summary judgment to Cablevision with respect to both rights.<sup>42</sup> The appellate court, resolving the holding of reproduction infringement, based its reversal on the span of time the programs spent in the RS-DVR system’s buffers and the determination of whose “volition” produced the copies.<sup>43</sup> The court discarded the second type of injury, which was based on unauthorized public performance, after determining the defendant was entitled to summary judgment because each transmission was made to a single subscriber using a single unique copy produced by that subscriber.<sup>44</sup>

#### F. RATIONALE

In its resolution of the reproduction violations, the Second Circuit held that the district court ignored significant portions of the Act and relied upon inadequate case law to address the issues at hand.<sup>45</sup> The court found the precise definitions of terms within § 101 of the Act controlling for the question of whether RS-DVR’s buffering system directly infringes plaintiffs’ copyrights, specifically the definition of the term “fixed.”<sup>46</sup> The Second Circuit criticized the court below for ignoring what it referred to as the second prong of the definition, “[f]or a period of more than transitory duration.”<sup>47</sup> While reluctant to explain exactly what it thought a “transitory duration” might be, the court found that the RS-DVR buffer system’s retention of the data for no more than 1.2 seconds before overwriting it does not “embody” the copyrighted works long enough to trigger a violation of the Act.<sup>48</sup> The Second Circuit also wrote that the district court’s holding improperly relied on certain cases when evaluating the second infringement by reproduction claim, namely that the copying of data from the server buffer to the hard

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40. *Id.*; see also *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991).

41. See generally *Cartoon Network*, 536 F.3d at 121.

42. *Id.* at 140.

43. See *id.* at 130-32.

44. See *id.* at 139-40.

45. See *id.* at 139.

46. *Id.* at 127; see also 17 U.S.C.A. § 101 (West 2008).

47. *Cartoon Network*, 536 F.3d at 127.

48. *Id.* at 129-30.

disks constituted copying in violation of the Act.<sup>49</sup> The appellate court rejected the district court's belief that *Netcom* was limited strictly to the "unique attributes of the Internet," and instead followed the approach of the Fourth Circuit, which found *Netcom* to be "a particularly rational application of § 106" of the Act.<sup>50</sup> In addition, the court found the comparison of the copyshop in *Princeton University Press* inapplicable to the present situation; instead of customers placing orders with a human copyshop employee, users of the RS-DVR system trigger processes within an automated system, which never implicates the "volition" of Cablevision.<sup>51</sup> While these differences alone might have justified the Second Circuit's decision, the court further criticized the district court by applying its own analogy to *Sony Corp. of Am. v. Universal City Studios, Inc.*, which involved Betamax VCR technology, and found the existence of a "continuing relationship" between the cable company and the customer more relevant to contributory liability, which the plaintiff's claim specifically excluded.<sup>52</sup>

In reversing the district court's decision regarding infringement by public performance of a protected work, the Second Circuit again looked to § 101 of the Act for guidance regarding the precise definition of "public performance."<sup>53</sup> The court found that the definition required an inquiry into who was "capable of receiving" the transmission of protected material.<sup>54</sup> The Second Circuit supported its conclusion by analyzing the House Report on the 1976 Copyright Act, and emphasized the use of the phrases "by transmission to the public at large" and "potential recipients of the transmission."<sup>55</sup> Applying principles distilled from the Act itself and the House Report, the appellate court reversed the finding of the court below, declaring that it "[c]annot reconcile the district court's approach with the language of the transmit clause."<sup>56</sup> The individualized nature of the selections of recorded programming and the discrete copies of material used by each consumer

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49. *Id.* at 130-33.

50. *Id.* at 131; *see also* 17 U.S.C.A § 106 (West 2008); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549-551 (4th Cir. 2004); *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs.*, 907 F. Supp. 1361, 1372 (N.D. Cal. 1995).

51. *Cartoon Network*, 536 F.3d at 131-32. *See generally* *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381 (6th Cir. 1996) (en banc) (holding copy shop's creation of course packs was not fair use).

52. *Cartoon Network*, 536 F.3d at 132-13. *See also* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

53. *Id.* at 134.

54. *See id.*

55. *Id.* at 135; *see also* H.R. Rep. No 94-1476 (1976).

56. *Cartoon Network*, 536 F.3d at 135.

were dispositive facts to the Second Circuit, which held that the use of the RS-DVR does not constitute a private performance.<sup>57</sup>

### G. CRITIQUE

To reach its first two holdings, the Second Circuit references three different technologies it somewhat analogizes to the RS-DVR system: videocassette recorders, photocopiers, and computer random access memory ("RAM").<sup>58</sup> While the court had only direct infringement claims before it, this limitation neither supports its reasoning, nor explains the court's strained reading of Section 101.<sup>59</sup>

First, the court parses the definition of "fixed" provided in Section 101 into two requirements: "embodiment" and "duration," before evaluating the district court's rationale based in *MAI Systems Corp. v. Peak Computer, Inc.*, a computer RAM case.<sup>60</sup> This construction is accomplished by isolating the phrase "for a period of more than a transitory duration" from the rest of the definition and insisting that it have meaning independent of the surrounding terms.<sup>61</sup> Purpose can be found for these words without requiring it to stand entirely independent; it can be viewed as elaborating or qualifying the terms it follows, particularly "copied, perceived, or communicated."<sup>62</sup> This language, given the formerly exclusive importance of the term "fixed" to the question of *creation* of a work, can be given meaning in conjunction with these terms, a position strongly supported by the legislative record.<sup>63</sup> The

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57. *Id.* at 139.

58. *Id.* at 128-33.

59. *Id.* at 124.

60. *Id.* at 127; *see also* *MAI Computer Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) (finding computer programs stored temporarily in RAM are fixed copies).

61. *Cartoon Network*, 536 F.3d at 127.

62. The full text of the definition provides:

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

17 U.S.C.A. § 101 (West 2008).

63. In discussion of the definition of "fixed" as amended by the Act, the Report states:

Thus, assuming it is copyrightable—as a 'motion picture' or 'sound recording,' for example—the content of a live transmission. should be regarded as fixed and should be accorded statutory protection if it is being



House Committee on the Judiciary Report on the 1976 Copyright Act's ("the Report") definition of "fixed" discusses the term in the context of creating copyrighted works (such as live sports broadcasts). The second sentence of the definition provides that if a recording is being made at the same time as it is transmitted, it is automatically "fixed" to qualify for statutory protection.<sup>64</sup> The House of Representatives emphasizes throughout the Report its intent to craft the 1976 Act in such a way as to accommodate technological advancement without requiring the definitions to be changed repeatedly.<sup>65</sup> The Report explicitly describes an intention to allow a means by which the entity broadcasting a live sporting event of transitory and unpredicted form—undoubtedly, a modern creative work involving legions of cameramen, commentators, and directors—to simultaneously "fix" the broadcast sufficiently to sustain the traditional copyright requirements.<sup>66</sup> It is extraordinarily unlikely that the authors of Section 101 contemplated that advances in data storage and transmission would result in the words "transitory duration" being employed to chop Cablevision's efficient, profit-driven, mass reproduction process into pieces small enough that, for a period of less than two seconds, there are no "copies" justifying relief.<sup>67</sup> In support of its view, the Second Circuit states that the *MAI Systems* finding of copying does not mean that data loaded into RAM "*always* results in copying" and therefore does not forbid its splitting of the "fixed" definition.<sup>68</sup> The court disposes the U.S. Copyright Office's 2001 DMCA Report regarding this matter by pointing out

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recorded simultaneously with its transmission. On the other hand, the definition of 'fixation' would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the 'memory' of a computer. There is a grammatical error in the cited source, must be repeated in the quote as well.

H.R. Rep. No. 94-1476 at 52-53 (1976).

64. *See id.*

65. *See, e.g., id.* at 47-53.

66. *Id.* at 52-53.

67. The House Report avoids dividing the verbs of the definition from the duration clause when it quotes from Section 106—note the use of quotation marks in the following excerpt:

'Reproduction' under clause (1) of section 106 is to be distinguished from 'display' under clause (5). For a work to be 'reproduced,' its fixation in tangible form must be 'sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.'

*Id.* at 62.

68. *Cartoon Network L.P. v. CSC Holdings, Inc.*, 536 F.3d 121, 128 (2d Cir. 2008).

that it is inconsistent with its bisecting of the definition.<sup>69</sup> Only one case is mentioned by the Second Circuit in support of this view, and while that decision is similar in some of its discussion of the statute, it ignores a crucial factual distinction: unlike the internet service provider in *CoStar Group, Inc. v. LoopNet, Inc.*, the RS-DVR buffer exists for the express purpose of producing copies, not a retransmission service which incidentally makes temporary copies of data as it moves it along.<sup>70</sup> Therefore, instead of applying the clause “for more than a transitory duration” to prevent the assertion of copyright protection to a unfixed or temporary work incapable of reproduction, the result is to deny relief to owners of already fixed and copyrighted works from a mass-reproduction process because it is too fast. The production of copies is so rapid and efficient that “master” copies of the work are no longer needed by those seeking to profit from unauthorized reproduction in willful disregard of valid and exclusive copyrights.

The court’s holding about playback copies relies heavily on analogies to using a VCR or photocopier and appears reasonable at first blush. However, the Second Circuit’s treatment of the arguments advanced by the plaintiffs surrounding the *Religious Technology Center v. Netcom On-Line Communication Services* and *Princeton University Press v. Michigan Document Services* decisions is somewhat perplexing.<sup>71</sup> The court appropriately rejected the district court’s reading of *Netcom*, which felt the reach of that case was limited to the Internet.<sup>72</sup> However, stating that “[v]olitional conduct is an important element of direct liability,” the Second Circuit focuses on the volition required to initiate the creation of a copy; the *Netcom* court also found the volition of the service provider at the time the service was created to be critical.<sup>73</sup> The court makes a brief mention of the volitional conduct in the design of the RS-DVR system, but entirely drops the issue in its rush to a series of comparisons between RS-DVR users and VCR users.<sup>74</sup> This incomplete analysis is likely due to the lack of a claim of contributory infringement against Cablevision, but it is nonetheless troublesome. More disturbing to

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69. *Id.* at 129; see also U.S. Copyright Office, *DMCA Section 104 Report 111* (Aug. 2001), available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

70. See *Cartoon Network*, 536 F.3d 121, 129; but see *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004) (“the entire system functions solely to transmit the user’s data to the Internet”).

71. *Cartoon Network*, 536 F.3d at 130-33.

72. *Id.* at 131; see also *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs.*, 907 F. Supp. 1361, 1361 (N.D. Cal. 1995) (remarking finding of direct infringement would lead to “unreasonable liability” in the context of internet newsgroup servers).

73. Compare *Cartoon Network*, 536 F.3d 121, 130-33 with *Netcom*, 907 F. Supp. 1361, 1368-70.

74. *Cartoon Network*, 536 F.3d at 131.

copyright holders is the Second Circuit's conclusion that Cablevision, by automating the process and allowing the customer to press the button, is not the entity who "makes" the copies.<sup>75</sup> This approach appears to permit escape from direct liability through use of a suitably mechanized or computerized device, even if the sole function of the machine is to make copies of copyrighted works.<sup>76</sup> Further, while the court focuses on "volition," it never explains why vicarious liability for the infringement cannot be found by virtue of the ownership of the RS-DVR, as Section 106 of the Copyright Act does not require that any infringement of the exclusive rights be intentional.<sup>77</sup>

Unlike the VCR, which was found in *Sony* to have substantial non-infringing uses qualifying its manufacturer for the defense of fair use, the RS-DVR "[e]xists only to produce a copy" and no fair use was claimed by the defendants.<sup>78</sup> The court reversed the finding of Cablevision's liability because the intentional copying was automated, unlike Netcom, whose technology created copies "necessary to have a working system for transmitting Usenet postings to and from the Internet."<sup>79</sup>

The RS-DVR allows entities such as Cablevision to transform a license for a one-time prescheduled broadcast into a monthly fee service permitting an infinite number of discrete rebroadcast by merely automating the process and quickly destroying the materials used to make the playback copy. The state of technology was much more limited and expensive at the time of the *Sony* decision, where the majority opinion that the non-infringing "time-shifting" utility of the Betamax vastly surpassed its capacity for distribution of unlawful copies by customers.<sup>80</sup> The capacity of consumer media products is profoundly greater today: there exists affordable digital technology that permits an infinite number of copies to be made, which suffer no degradation in quality, and can be made instantly available to the world with the

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75. *Id.* at 131-32.

76. *Cartoon Network*, 536 F.3d at 131; *but see* Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp., 478 F. Supp. 2d 607, 620 (S.D.N.Y. 2007).

77. *See* 17 U.S.C.A. § 106 (West 2009).

78. *Compare Cartoon Network*, 536 F.3d 121 with *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *see also Twentieth Century Fox*, 478 F. Supp. 2d 607, 616 (explaining Cablevision's waiver of fair use defense).

79. *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs.*, 907 F. Supp. 1361, 1368 (N.D. Cal. 1995)

80. The Central District of California's findings of fact at the heart of *Sony* include some illustrative numbers: Betamax recorders "range in price from approximately \$875-\$1000" and the longest cassette tape made by Sony cost "approximately \$21" and allowed three hours of recording. *See, e.g., Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 435 (D.C. Cal. 1979). The price of achieving vastly superior technology in today's marketplace is staggeringly lower, even before adjustment of these figures to account for inflation.

click of a button. Many “TiVo-like” DVR systems have the ability to export stored content to a connected recording device. Whether or not the RS-DVR system provides a similar utility, it is a simple operation to insert your recording device, be it a personal computer or a DVD-ROM burner, between the DVR and the television set in order to create your undoubtedly “fixed” master copy. While content providers could begin accounting for this during negotiations for an initial broadcast agreement, it has grave consequences to the worth of existing licenses for one-time broadcast and the value of “video-on-demand” licenses.

The Second Circuit’s discussion of the phrase, “to the public,” in the transmit clause turns again into a discussion of the “copies,” and its holding requires the acceptance of a bizarre result. If the number of RS-DVR users reaches a million, a creative work theoretically protected by an exclusive performance right could be broadcast from a single location and simultaneously viewed by an average of seven hundred people a minute without ever being a public performance. The desire to avoid an arbitrary minimum number of persons to form a floor for the “public” determination should not allow an infringer to partition his conduct merely by making many individual copies of open-ended lifespan on the hard disks, which can be watched at a whim. Courts are understandably reluctant to call a direct transmission of data into an individual living room, regardless of the number of occupants, “public.” The effect of that reluctance is the equivalent of treating the theft of ten thousand dollars as *de minimis* when rounded to the “nearest billion” or calling it “a mere million pennies.”

## H. WHAT DOES IT ALL MEAN?

The Second Circuit’s opinion raises several questions that remain unanswered, either because they were not addressed by the parties in the proceedings below, or were simply not necessary to the court’s opinion. The implications of each are profound.

First, what about direct infringement by the customer? The Second Circuit’s disposal of the “who makes the copies” question certainly implies the RS-DVR customer. It seems indisputable that the programs stored on the hard disks are “copies” under the Act; the next question would be whether the copying by customer can be justified under fair use or other defenses to infringement. In light of the various technological advances since the *Sony* decision, the argument of “substantial non-infringing uses” of the RS-DVR preventing contributory liability appears weak. Additionally, the issue of whether “archiving” by the public infringes upon copyrights has not been resolved in the twenty-plus years since *Sony*, and today’s technology is vastly superior to the new-at-the-time Betamax.

Directly related to this first question is another: If the customer is directly infringing protected works, does Cablevision illegally contribute to that infringement? This question, not addressed as it was not argued in the proceedings below, seems to require an affirmative answer. Cablevision has provided its RS-DVR customers with an automated system by which they

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can transform an authorized public performance of copyrighted work, the original broadcast schedule, into an embodiment stable enough to be “perceived, reproduced, or otherwise communicated” and preserved indefinitely in the customer’s designated hard drive space.

Finally, if holding data for 1.2 seconds in a buffer cannot be copying and undeniable copies are ignored when the process is automated and set in motion by another, does that mean all direct copyright violations can be dodged with insertion of an overwriting buffer system into the means of reproduction? Federal protections for printed work—the foundation technology underneath the premises of the Copyright Clause—will disappear with construction of a robot to rapidly copy books by hand: one which creates a intermediate copy of individual pages, from which it makes numerous copies to be assembled and bound for the customer, and destroys the “buffer” copy afterward. Instead of charging fees for delivering a copy of the book, fees could be collected for use of your “scribe” robot, or any automated system which only exists to create copies and upon command given by customers, the use of which would prevent any finding of direct infringement for the creation of the copies, regardless of the owner or manufacturer’s intent to circumvent licensing requirements. At least in the Second Circuit, the answer appears to be clear: anyone can generate infinite copies that achieve absolution through automation, so long as you quickly enough forget what you did.